SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2002-010580 02/28/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

RAVEN ROCK CONSTRUCTION LLC FRANK L ROSS

v.

MARICOPA COUNTY BOARD OF SUPERVISORS DAVID H BENTON

REMAND DESK CV-CCC
OFFICE OF ADMINISTRATIVE REVIEWS
1400 W WASHINGTON ST
STE 101
PHOENIX AZ 85007

MINUTE ENTRY

This Court has jurisdiction of this appeal pursuant to A.R.S. § 11-808(G) and the Administrative Review Act, A.R.S. § 12-901, et seq. This case has been under advisement and the Court has considered and reviewed the record of the proceedings before the Maricopa County Board of Supervisors and the Maricopa County Department of Planning and Development and the memoranda submitted by counsel.

On June 11, 2001, Defendant issued Plaintiff a Notice and Order to Comply with Maricopa County Zoning Ordinance for violation of Article XXIII, Sec. 2310 that prohibits parking of non-accessory vehicles in a residential district.[1] A hearing took place November 1, 2001 and continued February 14, 2002 before the Maricopa County Department of Planning and Development at which time the hearing officer considered testimony and exhibits presented by

[1] The notice also described a violation of Article VI, Sec. 602, that prohibits business in a residential zoning district. However, the summons issued January 3, 2002 identified Article XXIII, Section 2310, parking of non-accessory vehicles in a residential district as the only violation. The hearing officer considered and issued his order with respect to that violation alone. The violation of Article XXIII, Sec. 2310, is the only violation at issue on this appeal.

Defendant, Maricopa County, and Plaintiff, Raven Rock Construction, L.L.C. ("Raven Rock"). Plaintiff contends that its property is exempt from zoning regulations pursuant to A.R.S. § 11-830(A)(2) and Section 2302 (renumbered Chapter 13, Section 1304) of the zoning ordinance because the property is land used for agricultural purposes and is of more than five contiguous commercial acres. Moreover, Plaintiff contends its property is exempt as a matter of law and that Raven Rock does not have to apply for an exemption, as required by the ordinance, in order to be exempt. Defendant contends that the property is not exempt because the owner has not sought an exemption and has not obtained an agricultural classification for the property as required for an exemption by Section 2302(1),(2) (renumbered Articles 1304.1, 1304.2) of the ordinance. The hearing officer found Plaintiff responsible for the violation of Article XXIII, Section 2310, parking non-accessory vehicles in a residential district. The hearing officer also found that "the property may be eligible for the agricultural exemption, however currently no application has been applied for nor granted."[2] Plaintiff appealed the hearing officer's decision to the Maricopa County Board of Supervisors. The Board of Supervisors upheld the decision of the hearing officer and this appeal was filed pursuant to § 11-808(G) and the Administrative Review Act, § 12-901, et seq.[3]

1. Standard of Review

The issues in this case concern whether under the facts presented by the parties, the property in question is exempt from the Maricopa County zoning regulations as a matter of law. On appeal of an administrative board's decision pursuant to the Administrative Review Act, the superior court determines whether the administrative action was illegal, arbitrary, capricious, or was an abuse of discretion.[4] As to questions of fact, this court does not substitute its judgment for that of the administrative agency, but reviews the record only to determine whether substantial evidence supports the agency's decision.[5] Questions of statutory interpretation involve questions of law and the appellate court is not bound by the administrative agency's conclusion.[6] The reviewing court may draw its own conclusions as to whether the administrative agency erred in its interpretation and application of the law.[7]

[2] Judgment and Orders of the Hearing Officer, March 18, 2002.
[3] Letter to Frank L. Ross from Fran McCarroll, Clerk of the Board, dated May 2, 2002, advising Raven Rock of the Board of Supervisors' action.
[4] A.R.S. § 12-910(G), *Siegel v. Arizona State Liquor Board*, 167 Ariz. 400, 401, 807 P.2d 1136 (App. 1991).
[5] *Petras v. Arizona State Liquor Board*, 129 Ariz 449, 452, 631 P.2d 1107 (App. 1981).
[6] *Seigal*, 167 Ariz. 401.
[7] *Carondelet Health Services v. Arizona Health Care Cost Containment System Administration*, 182 Ariz. 502, 504, 897 P.2d 1388 (App. 1995).

2. Jurisdiction

Defendant argues that Plaintiff raises issues not within the purview of the Board of Supervisors and thus not within the jurisdiction of this Court on review.[8] The Board of Supervisors cannot consider the policies of the Assessor's Office.[9] This Court's review is limited to matters properly before the Board of Supervisors. *Madsen v. Fendler*, 128 Ariz. 462, 465, 626 P.2d 1094, 1097 (1981). This Court cannot consider how the Assessor's Office determines property classifications because the Board of Supervisors could not consider that issue. However, Plaintiff contends its property is exempt as a matter of law. Plaintiff assumes it cannot obtain an agricultural classification because of the acreage of his property without applying for an exemption or for an agricultural classification. The hearing officer found that the Plaintiff had not obtained or applied for an agricultural exemption. This Court's review is limited to whether the record supports the hearing officer's findings and whether as a matter of law plaintiff is not required to seek an exemption.

3. Exemption for Property used for agricultural purposes.

Plaintiff contends that its property meets the requirements for exemption under the statute and ordinance and that it does not need to apply for the exemption to have it.[10] Both the statute and the zoning ordinance provide that the ordinance "shall not regulate the use or occupation of land or improvements for . . . general agricultural purposes, if the tract concerned is five or more contiguous commercial acres."[11] The zoning ordinance provides that "property is not exempt from [the zoning ordinance] unless and until the Maricopa Planning and Development Department has issued a certificate of exemption for that property."[12] "Only property classified by the Maricopa County Assessor's office or the Arizona Department of Revenue as property used for one of the purposes enumerated . . . is eligible for exemption under this section."[13] The requirement that a property owner obtain a certificate of exemption and the current provision regarding exempt purposes were added by February 4, 2000 amendments to the zoning ordinance. However, prior to the 2000 amendments, Section 2302 provided that agricultural purposes means only property classified agricultural by the County Assessor. The classification provision was added to Section 2302 by amendment in 1994.[14]

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[8] Defendants Appellant Brief, at 5,6.
[9] *Id.*
[10] Plaintiff's Opening Memorandum, *passim.*
[11] A.R.S. § 11-830(A)(2), Section 2302 (renumbered Article 1304) of the Maricopa County Zoning Ordinance..
[12] Section 2302(1) (renumbered Article 1304.1).
[13] Section 2302(2) (renumbered Article 1304.2).
[14] In its memorandum, Plaintiff incorrectly states that both Section 2302(1) and 2302(2) were added to the zoning ordinance by amendment in 1994. For purposes of this case, it is significant only that both provisions were part of the zoning ordinance long before Plaintiff was cited for the violation.

At the hearing, Defendant presented evidence that the Plaintiff does not have a certificate of exemption issued by the Maricopa Planning and Development Department and has not applied with the Maricopa County Assessor's Office for an agricultural classification.[15] Thus, unless Plaintiff is excused from the requirement that its property obtain the certificate of exemption, the record supports the hearing officer's findings and the Board's conclusion.[16]

Plaintiff first argues that it would be a futile act for it to apply for agricultural classification because the Assessor's office classifies property as agricultural only if the parcel is a minimum of 20 acres.[17] Plaintiff also argues that pursuant to A.R.S. § 42-12151, only property greater than 20 acres qualifies as agricultural real property.[17] According to Plaintiff, the ordinance and the statute that exempt agricultural property of 5 or more commercial acres conflict with the requirements of the assessor's office. Plaintiff argues that if it is required to seek an agricultural classification, it is required to perform a futile act.[18] The Defendant submitted materials to demonstrate that many categories of agricultural classifications do not have a minimum acreage requirement according to the Assessor's office and the Arizona Department of Revenue.[19] Moreover, A.R.S. § 42-12154 provides that the county assessor may approve the agricultural classification of property if the property has fewer that the minimum number of acres prescribed in A.R.S. § 42-12151. The statutes and manuals do not preclude agricultural classification for parcels less than 20 acres. The record provides substantial support for the hearing officer's findings.

4. Exhaustion of administrative remedies.

Plaintiff contends that it cannot obtain an agricultural classification and exemption from the zoning regulations because its property does not qualify under the County Assessor's policies.[20] However, plaintiff has not applied for the agricultural classification or for the exemption.[21] Defendant contends that Plaintiff has failed to exhaust its administrative remedies because it did not apply for an agricultural classification before raising the defense that it cannot obtain one.[22] Plaintiff, not having sought an exemption or classification through the proper administrative channels, has failed to exhaust its administrative remedies.

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[15] Transcript of Proceedings, February 14, 2002, at 3.
[16] This parcel does not have agricultural classification and an application for agricultural classification has never been filed with the Assessor's office according to the testimony of Bill Moody, Senior Appraiser of the Maricopa County Assessor's Office. Transcript of Proceedings, February 14, 2002, at 3.
[17] Plaintiff's Opening Memorandum, citing the testimony of Bill Moody, Senior Appraiser of the Maricopa County Assessor's Office, at 1,2.
[17] R.T. of proceedings, February 14, 2002, at 21.
[18] Id.
[19] Arizona Department of Revenue, Division of Property Valuation and Equalization, Agricultural Manual, Exhibit B to Defendant Appellate Brief.
[20] Plaintiff's Opening Memorandum, *passim*.
[21] Judgment and Orders of the Hearing Officer, March 18, 2002
[22] Defendant Appellate Brief, at 7,8.

It is well settled that all administrative procedures must be exhausted before a party can seek judicial review.[23] The "doctrine of exhaustion of administrative remedies applies where a claim is cognizable in the first instance by the administrative agency alone."[24] Here, Plaintiff contends that it does not need to apply for the exemption because to do so would require a futile act. In *Minor v. Cochise County*, the Arizona Supreme Court rejected Minor's argument that a party is relieved from the exhaustion requirement when it appears it would be useless or futile to pursue the matter with the administrative agency. Plaintiff must first test its contention by appropriate administrative action before it can raise that issue with this Court. [25]

5. Legal nonconforming use

Plaintiff next argues that if the property is not exempt, it is protected from the zoning enforcement action under Section 2501 of the zoning ordinance as land used for agricultural purposes prior to the 1994 amendment to the ordinance.[26] In support of this argument, Plaintiff relies on the testimony of its representative, Greg York, that its property was a farm for twenty to twenty-five years.[27] In response, Defendant argues that Plaintiff must provide evidence that its property was agriculturally classified prior to the issuance of the Notice of Violation, making it eligible for an exemption.[28]

Section 2501 (renumbered as Chapter 13, Section 1305) provides that any use of land lawfully existing at the time the ordinance or amendments become effective may be continued even though its use does not conform with the ordinance or amendments. A nonconforming land use is a lawful use maintained after the effective date of a zoning ordinance prohibiting such use in the applicable district.[29] The 1994 and 2000 amendments to the zoning ordinance did not change the lawful use of land and did not change the exemption for land used for general agricultural purposes. The amendments merely established procedures for obtaining the exemption. The 1994 amendment did not change the lawful land use for Plaintiff's property. Plaintiff is not denied its agricultural use of the property nor an exemption for land used for general agricultural purposes by the amendments. Plaintiff merely has to follow the procedures established by the amendments. Nonconforming uses existing at the time a zoning ordinance becomes effective cannot be prohibited but are subject to reasonable regulations. *Whiteco Outdoor Advertising v. City of Tucson*, 193 Ariz. 314, 972 P.2d 674 (App. 1998). The nonconforming use provision only protects Plaintiff's use of its land for general agricultural

[23] *Southwest Soil Remediation, Inc. v. City of Tucson*, 36 P.2d 677 (Ariz. App. 2001), *Minor v. Cochise County*, 125 Ariz. 170, 172, 608 P.2d. 309, 311 (1980).
[24] *Minor v. Cochise County*, 125 Ariz. 170, 172, 608, P.2d 309 (1980).
[25] Id.
[26] Plaintiff's Opening Memorandum, at 4.
[27] Plaintiff's Opening Memorandum, at 1.
[28] Defendant's Appellate Brief, at 9-10.
[29] *Jones v. County of Coconino*, 201 Ariz. 368, 35 P.3d 422 (Ariz. App. 2001).

purposes. It does not protect Plaintiff from reasonable regulations that describe the means by which the exemption is established.

Because the 1994 amendment did not change the lawful uses of Plaintiff's property, the nonconforming use rule is not applicable to Plaintiff's situation. To the extent Plaintiff argues that the amendment changed the lawful use because the amendment changed the exemption requirements, Plaintiff would have to establish that its property was classified agricultural before 1994 and lost that exemption by the 1994 amendment. This argument is not available to plaintiff because it has not applied for the exemption.[30] The record does not support either that the property was classified agricultural in 1994 or that Plaintiff is unable to acquire an exemption as required by the ordinance.

6. Conclusion

No evidence established that the property had been classified as agricultural prior to the Notice of Violation or prior to the amendments in either 1994 or 2000. Defendant presented evidence that the property does not have an agricultural classification. The Code Enforcement Officer testified that the property does not have agricultural classification.[31] Bill Moody, Senior Appraiser for the Assessor's Office testified that the property does not have agricultural status.[32] Mr. Moody testified that the property does not now and has never had agricultural classification.[33] In addition, Mr. Moody testified that the property owners had not filed an application for agricultural classification.[34] According to the records of the Maricopa County Assessor's Office, the "[p]arcel has never had agricultural classification since it was created in 1989."[35] The hearing officer found that although the property may be eligible for agricultural exemption, no application for exemption has been submitted or granted and therefore the property was not exempt.[36] Before the Board of Supervisors, Raven Rock conceded it has not applied for the agricultural classification or for the excemption.[37] Joy Rich, Director of Planning and Development for Maricopa County said Raven Rock had not applied for nor received the exemption.[38] The record provides substantial evidence that supports the hearing officer's finding and the Board of Supervisors' action.

IT IS THEREFORE ORDERED affirming the decision of Maricopa County Board of Supervisors.

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[30] Section 4, Exhaustion, *supra*.
[31] Transcript of Proceedings, November 1, 2001, page 15.
[32] Transcript of Proceedings, February 14, 2002, page 3.
[33] Transcript of Proceedings, February 14, 2002, page 9.
[34] Transcript of Proceedings, February 14, 2002, page 3.
[35] Defendant's hearing Memorandum, December 6, 2001, Exhibit C.
[36] Judgment and Orders of the Hearing Officer, March 18, 2002.
[37] Transcript of proceedings before the Board of Supervisors, May 1, 2002, page 5.
[38] Id., page 4.

IT IS FURTHER ORDERED denying all relief requested by Plaintiff, Raven Rock Construction LLC.

/S/ HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT